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IN THE

Supreme Court of the United States

October Term, 1962

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No. ~~[illegible]~~ and No. ~~807.~~

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, EASTERN AIRLINES, INC., LOCKHEED AIRCRAFT CORPORATION and GENERAL MOTORS CORPORATION,

and

THE UNITED STATES OF AMERICA,
Petitioners,

v.

ROBERTA BARRACK, Admx., Etc., Et Al. (No. 13994),
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS ROBERTA BARRACK, ADMX., ETC., ET AL., IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 738 and No. 851.

FRANCIS L. VAN DUSEN, UNITED STATES DISTRICT JUDGE, ET AL.,

Petitioners,

v.

ROBERTA BARRACK, ADMINISTRATRIX, ETC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS, ROBERTA BARRACK, ADMX., ETC., ET AL. (NO. 13994), IN OPPOSITION.*

OPINIONS BELOW.

The opinion of District Judge Van Dusen is adequately set forth in the petitions (No. 738 and No. 851, this Term). The opinion of the Court of Appeals filed November 19, 1962 and reported at 309 F. 2d 953 *sub nom. Barrack v. Van Dusen* is adequately set forth in both petitions *except* for an amendment (as yet unreported) by order dated February 21, 1963, to correct a manifest inadvertency therein; the order and amendment of the opinion are printed in Appendix B to this Brief in Opposition.

* This Brief in Opposition is filed on behalf of those plaintiffs who were Petitioners for Writ of Mandamus or Prohibition under No. 13994 in the United States Court of Appeals for the Third Circuit as listed in Appendix A, *infra*, pp. 1b-2b.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petitions.

QUESTIONS PRESENTED.

1. Is the Massachusetts District Court a court where these death actions "might have been brought" within the meaning of § 1404(a) of the Judicial Code, where all of the fiduciary plaintiffs there lacked capacity to sue as a matter of right except by the wish, waiver or consent of the defendants?

2. Where plaintiffs properly institute death actions in their home forum against defendants there engaged in business, can transfer be "in the interest of justice" where its effect is to emasculate the plaintiffs' claims by substituting a harsh and penal limitation on damages in violation of the strong public policy of the forum state?

3. Where domiciliaries of the Eastern District of Pennsylvania, who are personal representatives appointed by appropriate state courts situate in that District, bring suit in that District to recover damages for the wrongful death of domiciliaries of that same District and all beneficiaries therein reside and all defendants are there engaged in business, does not transfer to a distant district constitute a clear abuse of discretion, where such transfer results in radical emasculation of the measure of damages to the detriment of the parties opposing transfer?

STATUTE INVOLVED.

62 Stat. 937, 28 U. S. C. § 1404(a), is set forth in both petitions.

STATEMENT.

On October 4, 1960, an Electra airplane manufactured by Lockheed, having engines made by General Motors, and owned and operated by Eastern Air Lines, Inc., crashed immediately after take-off from Logan Airport, Boston, Massachusetts, on a scheduled non-stop flight to Philadelphia. Aboard were sixty-seven passengers and a crew of five, of whom fifty-seven passengers and three crew members were fatally injured.

This Brief in Opposition embraces suits filed in the United States District Court for the Eastern District of Pennsylvania by the personal representatives of nine deceased passengers against the three named corporate defendants; separate suits on the same claims were instituted against the United States under the Federal Tort Claims Act. There are therefore eighteen cases pending within No. 13994.[1] The gravamen of the claims is that the negligence of the four defendants caused the crash.

All of these decedents were domiciliaries of the Eastern District of Pennsylvania. All of the personal representative plaintiffs are domiciliaries of the Eastern District of Pennsylvania. All were appointed by Pennsylvania courts; none received any letters of administration from any probate court of Massachusetts and none are or have ever qualified as personal representatives in that state. All of the survivors entitled to benefit from the wrongful death actions are domiciliaries of the Eastern District of Pennsylvania. All of the corporate defendants are engaged in business in the Eastern District of Pennsylvania.

The Massachusetts Death Act restricts damages to a "sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the de-

1. Forty-nine other actions have been instituted by other plaintiffs in the United States District Court for the Eastern District of Pennsylvania for deaths and injuries arising from the same crash.

gree of . . . culpability" (Mass. Ann. Laws, c. 229 § 2c); it was held by this Court to be a punitive statute. *Massachusetts Bonding & Ins. Co. v. United States*, 352 U. S. 128 (1956).

However, the Pennsylvania Constitution (Article III, § 21) prohibits (except for workmen's compensation laws) any limitation on the amount of damages to be recovered for injuries resulting in death. Pennsylvania case law refuses to enforce foreign penal statutes, even when they are remedial in nature.

Nevertheless, and over plaintiffs' objections, defendants' motions for transfer under 28 U. S. C. § 1404(a) to the United States District Court for the District of Massachusetts (Boston) were granted by the Honorable Francis L. Van Dusen, District Judge, for the "convenience" of parties and witnesses and "in the interest of justice" (District Court Opinion, App. in No. 738, p. 21a; App. in No. 851, p. 22a).

On petitions for writs of mandamus and prohibition, plaintiffs contended (1) that the District Judge was without power to enter the order of transfer because the Massachusetts District Court is not a district where these death actions "might have been brought" within the meaning of § 1404(a), (2) that transfer should be vacated as a matter of law because the transferee court would apply a penal limitation of damages to the prejudice of the parties opposing it and in violation of the strong public policy of the forum, and (3) that the order of transfer constituted a clear abuse of discretion.

The Court of Appeals held that the District Judge was without power to enter the order of transfer for the reason that under the Federal Rules of Civil Procedure and Massachusetts law, the plaintiffs lacked capacity to sue in the Massachusetts courts and that the District Court of that state was therefore not a district where these suits "might have been brought" within the meaning of 28 U. S. C. § 1404(a) as defined in *Hoffman v. Blaski*, 363 U. S. 335

(1960). Having so ruled, the Court of Appeals found it unnecessary to consider plaintiffs' two remaining alternative arguments.[2]

There followed the petition for writ of certiorari by the corporate defendants (No. 738, this Term) and a separate petition by the government (No. 851, this Term). This brief is submitted in opposition to both petitions.

SUMMARY OF ARGUMENT.

The opinion of the Court of Appeals is correct for the reasons stated therein. Under Massachusetts law the plaintiffs in these death actions have no capacity to sue in that Commonwealth; any such suit would be dismissed if this defense were not waived by the defendants. Under F. R. C. P. No. 17(b), capacity to sue in the federal courts is determined by reference to state law. The Court of Appeals properly followed this Court's opinion in *Hoffman v. Blaski*, 363 U. S. 335, which holds that a proposed transferee district is not one in which an action "might have been brought" under § 1404(a) if suit there could not originally have been instituted and maintained by the plaintiffs independently of the wish or waiver of the defendant.

The decision of the Court of Appeals is correct on two additional grounds.

The real reason that the defendants wish to transfer the within death actions is to avail themselves of the harsh penal limitation on damages in death cases obtaining in Massachusetts. Pennsylvania, the home forum of these plaintiffs and their decedents, would not enforce the Massachusetts penal limitation because it is contrary to the strong

2. Defendants in No. 738, this Term, in referring to the findings of the District Judge in support of transfer assert (p. 5): "In issuing the writ the Court of Appeals did not dispute these findings." In fact, the Court of Appeals expressly found it unnecessary to consider them (App. in No. 738, p. 24a; App. in No. 851, p. 28a).

public policy of Pennsylvania. Thus, transfer would emasculate the plaintiffs' damages.

The District Court's order of transfer constitutes a clear abuse of discretion for many reasons, among which are: (1) Pennsylvania has by far the greatest number and the most important contacts with this case and the parties thereto, (2) the weight of the evidence does not show that any substantial convenience to parties or witnesses would be served by transfer, (3) the so-called convenience of the parties and witnesses and prospective consolidation with other cases cannot possibly overbalance the severe hardship to plaintiffs which would be caused by trial in a distant forum and by the substitution of a harshly punitive limitation for full compensatory damages, (4) the District Court gave great weight to many irrelevant and improper considerations.

This case will have no substantial effect on other litigation. Defendant's contention to the contrary is illusory. Only one other reported case in the country has dealt with the issue here resolved by the Court of Appeals; these two opinions are in harmony inter se and with all other federal decisions. This case is also ad hoc because it involves a penal limitation on damages in death actions, and such penal limitations exist in only two states in the Union.

No compelling reason for the grant of certiorari exists and the defendants' petitions should be denied.

ARGUMENT.

In seeking review, the defendants urge as an internal inconsistency in the Court of Appeals' opinion what in fact was a manifest inadvertency relating to two cases not here involved (No. 738 at pp. 3-4, 11; No. 751, p. 7, n. 5, p. 12, n. 11). This is invoked by defendants as rising to error of law bringing § 1404(a) into collision with § 1406(a). However, the Court of Appeals' opinion was corrected by amendment entered February 21, 1963 which mooted the point (App. B, *infra*, pp. 3b-5b). These plaintiffs therefore make no further response to defendants' assertions on this subject.

I. The Opinion of the Court of Appeals Is Correct for the Reasons Stated Therein.

The Court of Appeals held that a district court has no power to transfer wrongful death actions to a district in which the plaintiffs have no capacity to sue. The Court's opinion relied upon and followed the opinion of this Court in *Hoffman v. Blaski*, 363 U. S. 335.

These cases were brought in a federal court in Pennsylvania in the district of their residence by Pennsylvanians as Pennsylvania fiduciaries of and for Pennsylvania decedents and their survivors.

Under Rule 17(b) of the Federal Rules of Civil Procedure, the capacity of a representative party to sue is to be determined by state law: ". . . capacity to sue or be sued shall be determined by the law of the state in which the district court is held . . .".

Under Massachusetts law a personal representative appointed in another jurisdiction is not thereby qualified to maintain an action in the Massachusetts courts; if a personal representative appointed in another state brings such suit and the defendant moves to dismiss, the motion must be granted: *Boutillier v. Wasinger*, 322 Mass. 495, 78 N. E. 2d 195 (1948). In that case a New Hampshire administra-

trix appointed by a New Hampshire court brought suit in Massachusetts under the latter's death statute. The unanimous Supreme Judicial Court of Massachusetts (per Chief Justice Qua) held that a timely motion to dismiss would have been granted, stating (page 496):

> "It is settled in this Commonwealth that an administrator appointed in another jurisdiction is not thereby qualified to maintain an action here under our death statute."

The corporate defendants cite *Boudreau v. New England Transportation Company*, 315 Mass. 423, 53 N. E. 2d 92 (1944), for the proposition that Massachusetts is liberal in permitting a foreign fiduciary who has brought suit in Massachusetts to obtain an ancillary appointment in Massachusetts and to amend his complaint after the statute of limitations has run (pp. 10-11 of petition in No. 738). However, what the *Boudreau* case actually held was that the defendant therein by its failure timely to plead the plaintiff's lack of capacity to sue had *waived* this defense; it was for that reason alone that the Court permitted the plaintiff's amendment to show capacity by subsequent appointment in Massachusetts.

Thus, it is abundantly clear from the *Boudreau* and *Boutillier* cases that lack of capacity to sue is an affirmative defense under Massachusetts law which will defeat the action if raised but which may be waived.

In *Hoffman v. Blaski*, 363 U. S. 335, this Court held that lack of venue (an affirmative defense which, like capacity to sue, may be waived by the defendant) in the transferee district absolutely precludes transfer under § 1404(a), even though the defendant agrees to waive that defense. This is so, this Court stated, because a proposed transferee district is *not* one in which an action "might have been brought", within the meaning of § 1404(a), if suit there could not originally have been instituted and maintained by the plaintiff "independently of the wishes of the defendant". This Court stated (pp. 342-344):

"We do not think the § 1404(a) phrase 'where it might have been brought' can be interpreted to mean, as petitioners' theory would require, 'where it may now be rebrought, with defendants' consent.' . . .

". . . . The transferee courts could have acquired jurisdiction over these actions only if properly brought in those courts, or if validly transferred thereto under § 1404(a). . . . But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff. . . .

"We agree with the Seventh Circuit that:

'If when a suit is commenced, plaintiff has a right to sue in that district, *independently of the wishes of defendant*, it is a district "where [the action] might have been brought." If he does *not* have that right, independently of the wishes of defendant, it is *not* a district "where it might have been brought," and it is *immaterial* that the defendant subsequently [makes himself subject, by consent, waiver of venue and personal jurisdiction defenses *or otherwise*, to the jurisdiction of some other forum].' " (Emphasis supplied.)

The corporate defendants argue (p. 10 of petition at No. 738), but cite no cases to support such argument, that § 1404(a) should be construed to mean that a district court may transfer an action to any other district which has jurisdiction and venue over the parties. The short answer to this contention is that if Congress had intended such a result it would simply have so stated, i.e., it would have provided that any civil action could be transferred to any other district "which has jurisdiction and venue over the parties". Congress, however, did not so provide; it limited the power of a district court to transfer a civil action "to any other district or division *where it might have been*

brought" (emphasis supplied), which means, as defined in *Hoffman v. Blaski*, 363 U. S. 335, 342-344, *where it might have been brought, as a matter of independent right, with or without defendants' consent and without reference to their wish or waiver.*

The Court of Appeals pointedly and properly disposed of this contention of the petitioners as follows (App. in No. 738, pp. 26a-27a; App. in No. 851, p. 31a):

> "We think that the holding in Hoffman v. Blaski, supra, compels the conclusion that respondent was without power to transfer these actions. The import of that decision is that unless the plaintiff *had an unqualified right to bring suit* in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a). Hence, the fact that at oral argument counsel for intervenors expressed a willingness to waive any objection to petitioners' capacity to sue in Massachusetts is beside the point. Nor can the district court's statement that these actions involve the legal fiction of the appointment of a personal representative be used as a basis for distinguishing them from Hoffman v. Blaski, supra. Certainly the requirement of capacity to sue is no more a legal fiction than is the necessity for having proper venue. Obviously, it, like venue, can be waived. Rules 9(a) and 12(h), Fed. R. Civ. P. But waiver or the possibility of waiver did not alter the Supreme Court's conclusion in Hoffman. In short, we can perceive no basis in either logic or policy for making any distinction between the absence of venue in the transferee forum and a prospective plaintiff's lack of capacity to sue there."

In *New York Central Railroad Company v. United States*, 200 F. Supp. 944, 947 (S. D. N. Y., 1961), the Court, per Judge Henry J. Friendly, held that the decision in

Hoffman v. Blaski is not limited to cases of jurisdiction and venue deficiencies, stating:

> "Hoffman v. Blaski, 363 U. S. 335, 80 S. Ct. 1084, 1085, 4 L. Ed. 1254 (1960), ruled against a claim that an action 'might have been brought' in a district where a defendant seeking transfer could not have been served with process and would have had a valid venue objection, although by his motion he accepted the jurisdiction of, and forewent objection to venue in, the proposed transferee court. *We do not read the opinion as limited to cases presenting such a conjunction of jurisdiction and venue deficiencies;* it approved, p. 344, 80 S. Ct. p. 1090, the statement of the Seventh Circuit, 260 F. 2d 317, at 321, and Behimer v. Sullivan, 261 F. 2d 467, at 469, that the statutory test is met only 'If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant.' Cf. Continental Grain Co. v. Barge FBL-585, 346 U. S. 19, 80 S. Ct. 1470, 4 L. Ed. 2d 1540 (1960)." (Emphasis supplied.)

The corporate defendants argue that the opinion of the Court of Appeals subverts the purpose of § 1404(a) "because of wholly unrelated matters of state law and of a supposed state policy" (p. 6 of petition in No. 738). They contend that by the decision below "state legislatures become the arbiters of the extent to which Acts of Congress governing procedure in federal district courts are effective" (p. 10 of petition in No. 738).

This argument is illusory. It is F. R. C. P. No. 17(b), promulgated by this Court, which requires all federal district courts to refer to the law of the state in which they sit to determine capacity to sue. What the Court of Appeals did was merely to apply a federal procedural rule which makes reference to state law mandatory. Under Rule 17 (b), how can matters of state law concerning capacity to sue be "wholly unrelated"?

Defendants also argue (pp. 6-12 of petition in No. 738, pp. 11-12 of petition in No. 851) that the decision of the Court of Appeals, following *Hoffman v. Blaski*, should be overruled because it would restrict the transfer of most actions for wrongful death, some of which arise out of airline crashes and other disasters.

This argument was ably and cogently answered by the Court of Appeals when it held (App. in No. 738, pp. 28a-29a; App. in No. 851, p. 33a):

> "Respondent and intervenors urge that the construction which petitioners seek would unduly circumscribe § 1404(a) in any action brought by a personal representative. The short answer to this is that by the use of the phrase 'where it might have been brought' Congress intended that the power to transfer should not be unqualified. That most jurisdictions do not permit foreign personal representatives to bring suit in their courts as a matter of right is a well known rule of law, and we cannot presume that Congress intended to alter state policy to the extent of permitting transfer of such suits to the federal courts sitting in those states. Indeed, as we previously noted, Rule 17 (b), Fed. R. Civ. P., requires the district court to refer to the law of the state in which it sits to determine capacity to sue. Finally, we must accept § 1404(a) as it has been construed by the Supreme Court in Hoffman v. Blaski, supra, i.e., that it permits transfer only if the plaintiff at the time of the commencement of the action had an independent right to institute suit in the transferee district."

Defendants' argument is not a sound approach to federal statutory construction. There is nothing to indicate that § 1404(a) was designed by Congress to be all-encompassing or was intended to permit the transfer of all manner of litigation with equal facility. Such, obviously, was not the intention of Congress, and was the precise reason that

Congress limited transfer to districts in which the action "might have been brought" by the plaintiff. If most of the states do not permit Pennsylvania personal representatives to bring actions as a matter of right in their state courts, it is certainly no cause for alarm that federal law should not gratuitously endow defendants with a right to transfer such actions to federal courts sitting in those states. Indeed, fairness and justice would seem to militate against any such endowment. And F. R. C. P. No. 17(b), promulgated by this Court, would prohibit it.

Moreover, there is good reason why it *should* be more difficult for the defendants to force the transfer of actions for wrongful death than it is for them to force the transfer of other types of litigation. Wrongful death actions are often cases of extreme hardship involving widows and small children and other dependents whose sole source of support has been taken from them. (This is true of most of the cases herein concerned.) It is normally a greater sacrifice for them than for most other litigants to be subjected to the rigors of lengthy travel, and to take up residence for long periods of time at distant points in order there to maintain and prosecute sustained litigation in a forum selected by the defendant as best situated to satisfy the convenience of itself and of its witnesses.

Also, the doctrine of *forum non conveniens* still exists in the federal courts, and may be utilized by any defendant to effect the dismissal of a case which has been brought arbitrarily in an improper forum. See *Hopson v. Hopson*, 221 F. 2d 839 (D. C. Cir., 1955).

The only other reported case in the country dealing with the issue here resolved by the Court of Appeals is *Felchlin v. American Smelting and Refining Company*, 136 F. Supp. 577 (S. D. Cal., 1955), which is in accord therewith (see discussion, *infra*, pp. 28-29). Section 1404(a) has been in effect since June 25, 1948. In light of the fact that there have been only two reported federal decisions dealing with this issue in the more than 14 years which

have passed since the effective date of the Act, it is difficult to accept the defendants' assertions that this case will have any massive effect upon other litigation throughout the country.

It is submitted that the statutory limitation upon transfer to districts in which the action "might have been brought", independently of the wish or waiver of the defendant (*Hoffman v. Blaski*, 363 U. S. 335), is both a sensible and desirable expression and recognition of Congressional intent. The opinion of the Court of Appeals is therefore clearly correct for the reasons therein stated.

II. The Opinion of the Court of Appeals Is Correct for Additional Reasons.

Plaintiffs additionally argued to the Court of Appeals that transfer was improper because it would result in emasculation of plaintiffs' damages, and because it constituted a clear abuse of discretion in the circumstances. The Court of Appeals expressly found it unnecessary to consider these alternative arguments. (App. in No. 738, p. 24a; App. in No. 851, p. 28a).

It is submitted that the decision of the Court of Appeals is correct and would have been required for the reasons discussed in plaintiffs' alternative arguments (summarized in subsections A and B, *infra*), regardless of the issue upon which the Court rested its decision.

A. Transfer Would Emasculate the Plaintiffs' Claims for Damages.

The real reason that the corporate defendants desire to transfer the within death cases to Massachusetts is because such transfer would substantially diminish the measure of damages to which the plaintiffs would be entitled.

Massachusetts and Alabama are the only two states in the United States having statutes imposing a penal or punitive restriction on damages for wrongful death:

Massachusetts Bonding & Insurance Co. v. United States, 352 U. S. 128, 130-131.

The General Provisions of the Massachusetts Death Act [G. L. (Ter. Ed.), c. 229, § 2C, as amended, 7A Ann. Laws of Mass. 407] provide that a person who negligently causes the death of another "shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability or that of his agents or servants." Compensatory damages are not awarded as provided for under Pennsylvania law: 12 P. S. §§ 1601-1604; *Spangler v. Helm's N. Y.-Pgh. M. Express*, 396 Pa. 482, 153 A. 2d 490 (1959).

The damages provision in the Massachusetts Death Act is based on concepts of punishment and is penal in nature. This Court so held in *Massachusetts Bonding & Insurance Co. v. United States*, 352 U. S. 128. The Supreme Judicial Court of Massachusetts so held in *Macchiaroli v. Howell*, 294 Mass. 144, 147, 200 N. E. 905 (1936), stating, "The chief characteristic of the statute is penal."

Pennsylvania courts would not enforce the penal limitation of damages contained in the Massachusetts Death Act and, consequently, a federal district court sitting in Pennsylvania would not enforce it, under the doctrine of *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941), which holds that a federal court is Constitutionally bound to apply the conflict of laws rule and public policy of the state in which it sits.

The Pennsylvania courts would not enforce the Massachusetts penal limitation because to do so would violate Pennsylvania public policy as expressed in Article III, § 21, of the Pennsylvania Constitution, which provides that the General Assembly may enact workmen's compensation laws "but in no other case shall the General Assembly limit the amount to be recovered for injuries resulting in death . . . ", and also because it has long been the established rule in Pennsylvania that Pennsylvania will not

enforce the penal provisions of a foreign statute, even when they are also remedial in nature: *Nesbitt v. Clark*, 272 Pa. 161, 116 Atl. 404 (1922); *Commercial National Bank v. Kirk*, 222 Pa. 567, 71 Atl. 1085 (1909).

While the Massachusetts statute until now has not been attacked in the Pennsylvania courts on the ground that it contravenes the public policy of Pennsylvania, it was recently considered by the Court of Appeals in the neighboring state of New York. In *Kilberg v. Northeast Air Lines, Inc.*, 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961), plaintiff's decedent was killed in an airplane crash in Massachusetts. Both plaintiff's decedent and the plaintiff were New York domiciliaries. The plaintiff brought suit for wrongful death in the state courts of New York. The New York Court of Appeals, in an opinion by Chief Judge Desmond, declared that New York would refuse to give effect to the Massachusetts penal provision limiting recovery on the ground that that provision contravened the public policy of the state of New York. The Court further held that the plaintiff could recover the compensatory damages which are recoverable under the New York Wrongful Death Act, totally free of the Massachusetts restriction. The Court of Appeals looked to and quoted from Article I, Section 18, of the New York Constitution as an expression of the public policy of that state, providing that "the right of action now existing to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitations."

It is clear that the Massachusetts penal provision limiting the recovery of damages in wrongful death actions equally contravenes the public policy of the Commonwealth of Pennsylvania as expressed in Article III, Section 21, of the Pennsylvania Constitution. The Constitution of Pennsylvania, like the Constitution of New York, embodies and expresses the firm public policy of the Commonwealth.

The *Kilberg* ruling, which had been attacked as a violation of the Full Faith and Credit Clause of the United States Constitution, was recently affirmed and applied by the U. S. Court of Appeals for the Second Circuit, sitting en banc, in *Pearson v. Northeast Airlines, Inc.*, 309 F. 2d 553 (1962), *cert. denied*, — U. S. —, 83 S. Ct. 726 (Feb. 18, 1963).

Regardless of the convenience of parties and witnesses, transfer under § 1404(a) may lawfully be ordered only when it would be "in the interest of justice". Justice means fairness. A transfer of death claims which substitutes a harshly restrictive punitive measure of damages for a fully compensatory rule violates all concepts of fairness and, as a matter of law, is not in the interest of justice.

It is submitted that the Court of Appeals would have been bound to vacate the District Court's order of transfer on this ground, even if it had not already determined that the transfer was invalid because Massachusetts is not a district in which the actions "might have been brought".

B. The District Court's Order of Transfer Constituted a Clear Abuse of Discretion.

It is important to note that all of the decedents in these death actions were residents and domiciliaries of the Eastern District of Pennsylvania. All of the plaintiff fiduciaries in these actions are therein domiciled and all were appointed by Pennsylvania courts. All of the survivors entitled to benefit from the wrongful death actions are residents and domiciliaries of the Eastern District of Pennsylvania. At the time of the accident all of the decedents were en route to their Pennsylvania homes on a non-stop flight to Philadelphia. All of the corporate defendants are engaged in business in the Pennsylvania forum. Pennsylvania could hardly have a greater interest in a case or a more significant contact with its parties than in the instant matters. No suggestion has been made that suits by these residents in their home district represent forum shopping or that they

constitute harassment, vexation or oppression as to the defendants in any manner whatsoever.

The weight given by the learned District Judge to such factors as were treated by him as requiring transfer, to the total exclusion of matters of substance invoked by plaintiffs but swept aside to their great detriment, points sharply to the conclusion that the order of transfer constituted a clear abuse of discretion; its grant and the reasons given for its grant skirt dangerously close to the proposition that the supposed convenience of the defendants in and of itself is sufficient to support transfer without genuine regard to the interest of justice and the private interest of the plaintiffs, where both latter factors point overwhelmingly to a contrary result. It is submitted that analysis seriatim of the factors relied on by the District Judge demonstrates clearly that the Court of Appeals was correct in vacating the order involved.

1. *Re Transfer Involving Emasculation of Damages to the Prejudice of the Parties Opposing It.*

Whatever may be said for the weight to be given to "the convenience of parties and witnesses", surely it cannot be said that the words "in the interest of justice" add nothing to the requirements of § 1404(a).[3] Yet here, transfer for supposed "convenience" of the defendants, and of some witnesses, would involve the application in the transferee court of a punitive restriction on the nature and measure of damages of such overwhelming magnitude as to produce nothing less than emasculation of these claims.

We submit that "convenience" cannot here overbalance the enormous potential loss to plaintiffs and their beneficiaries, that the expense to defendants of trial and counsel fees in the Pennsylvania federal court cannot possibly outweigh the detriment to plaintiffs in the radical and sub-

3. See District Court Transcript, Appendix C, *infra*, pp. 6b-8b.

stantial difference in the nature and measure of damages in the two jurisdictions.[4] We further submit that an order placing convenience ahead of the protection of substantive rights and the private interest of the litigant violates rather than furthers the interest of justice.

While it is true that the private interest of the litigants as an important factor to be considered was announced in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947), prior to the enactment of § 1404(a), nevertheless, in *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955), this Court held that even though the discretion under § 1404(a) is broader than under the former doctrine of forum non conveniens, the relevant factors to be considered here have not been changed. Even under *Norwood* "the interest of justice" remains the decisive test: *Coffilk v. Atlantic Coast Line R. R. Co.*, 180 F. Supp. 105, 107-8 (E. D. N. Y., 1960).

Pennsylvania has no less an interest in the protection of its domiciliaries than does New York as to its citizens [*Kilberg v. Northeast Airlines, Inc.*, 9 N. Y. 2d 34, 172 N. E. 2d 526; *Pearson v. Northeast Airlines, Inc.*, 309 F. 2d 553; *cert. den.*, — U. S. —, 83 S. Ct. 726; see *Richards v. United States*, 369 U. S. 1 (1962)]. To have so fundamental and deep-reaching an issue determined in the district of their permanent Pennsylvania residence, there favored and supported by local state policy, rather than in a strange and distant forum whose law and policy is in collision with that of their home state, constitutes an overriding consideration which merits the most serious weight and precise attention.

2. *Defendants Wholly Failed to Sustain Their Burden to Show That Transfer Is Justified Under § 1404(a).*

Whatever be the burden upon defendants to support transfer, whether it be to show that the balance is

4. In *Massachusetts Bonding & Insurance Co. v. United States*, 352 U. S. at p. 134, this Court recognized the "substantial differences in recovery" between compensatory damages and the Massachusetts penal limit.

"strongly" in their favor [*Gulf Oil Corp. v. Gilbert*, 330 U. S. 501; *Bush v. United Air Lines, Inc.*, 148 F. Supp. 104, 105 (S. D. N. Y., 1956)], or to show retention to be "oppressive, harassing and vexatious" [*Crawford Transport Co. v. Chrysler Corp.*, 191 F. Supp. 223, 228 (E. D. Ky., 1961)], or to show a "strong balance of inconvenience" [*Calva v. American Air Lines, Inc.*, 177 F. Supp. 238, 239 (D. C. Minn., 1959)], or to show the balance in their favor by "clear and convincing evidence" [*Headrick v. Atchison, Topeka & Sante Fe Ry. Co.*, 182 F. 2d 305 (10 Cir., 1950)], in any event, the interests of justice require that, at the very least, the defendants make some *affirmative* showing in order to overcome the plaintiffs' choice of forum. Where the factors are in doubt or in seeming balance or constitute "a close question" (District Court Opinion, App. in No. 738, p. 2a, in No. 851, p. 21a), then and in such case defendant has failed to sustain its burden and transfer must be denied.

Far from requiring defendants to meet *their* burden to justify transfer, the learned District Judge instead placed upon the plaintiffs the burden of showing why the cases should *not* be transferred and for their alleged failure to sustain *their* burden, set aside their choice of forum. We submit that the grounds advanced by the District Judge in support of transfer and now invoked by defendants demonstrate that the District Court's order was wrong and that the Court of Appeals' action is correct.

a. *Convenience of the Parties.*

The learned District Judge concluded that the first listed factor which "required" transfer was the convenience of the parties (Opinion, App. in No. 738 at p. 3a, in No. 851, at p. 4a). To this entire point, eleven lines of the opinion were devoted. The first three simply state that plaintiffs claim their convenience would be served by a trial in Philadelphia and defendants claim otherwise.

The Court then went on to observe that while the burden on the plaintiffs of bringing their damage testimony in the transferee District had not been overlooked, " . . . this is a burden often falling upon persons, who, having elected to travel away from home, are involved in accidents . . . " (Opinion, App. in No. 738, at p. 4a, in No. 851 at p. 5a).

We submit this to be an extraordinary and novel *ratio decidendi*. It has frequently been held, and with good reason, that defendants engaged in nationwide transportation business are expected to anticipate suits at various points where they operate. See, for example, *Bush v. United Air Lines, Inc.*, 148 F. Supp. 104, 105.

But never before have we heard it suggested, nor have we found any judicial support for the proposition that this burden shall fall not on the corporate defendants who derive their profits from operating in the Eastern District of Pennsylvania as well as elsewhere, but rather upon the individual passengers or their survivors who must, according to the District Court and the defendants, accept the forum fortuitously determined by the locale of impact of the falling aircraft, for no better reason than that they chose to or were required to travel.

The learned Judge then went on to say "none of the affidavits allege that any of the plaintiffs is impecunious nor is their financial condition stated in the records" (Opinion, App. in No. 738, at p. 4a, in No. 851 at p. 5a). We submit that more than anything else, the last quoted sentence demonstrates that the learned District Judge imposed on the plaintiffs the burden to establish hardship or serious inconvenience by retention. We would not think an affidavit would be required to show that travel by the widows (many with young children) from Philadelphia to Boston and their attendance at a protracted trial, would work substantial inconvenience and obvious hardship upon them. We submit that to predicate transfer on the absence of such an affidavit in the instant cases is to indulge in primitive formalism. Clearly the situation here is the

same as that which was so well stated in *Bush v. United Air Lines, Inc.*, in which, in denying the airlines' motion to transfer, the Court stated (148 F. Supp., at p. 105):

> "Here the plaintiff has properly exercised her venue privilege by initiating this action before this court. I have failed to find any substantiation for the defendant's argument that the plaintiff has chosen this forum on the basis of a 'shopping tour.' On the contrary, the plaintiff has all the cogent reasons possessed by a litigant acting with complete forthrightness. This action is a matter of grave concern to her and to her infant children. She has serious burdens of a legal and practical nature to sustain in the ensuing litigation. She can accomplish her task with far greater convenience here, where she is making her home with her children and earning her livelihood, than in Cheyenne, Wyoming, to which she is an utter stranger. This consideration is emphasized by the probable extended length of the trial which can take from two weeks to two months to try. There is not even the suspicion of harassment in her initiation of the suit in this district."

Under this heading of the District Court Opinion, there is absolutely nothing to show in any manner whatsoever how and on what grounds defendants established that the balance of convenience was either "strongly" or otherwise in favor of transfer. The order as to this point is bottomed on nothing more specific than defendants' "claim" of inconvenience and plaintiffs' failure by affidavit or otherwise to show their impecuniosity. Proof that the balance of convenience clearly favored defendants was an essential precondition to the exercise of the Court's discretion in determining where that balance lies. Mere "claim" of inconvenience does not equate with "transfer" under any view of the law. See *United Air Lines, Inc. v. United States*, 192 F. Supp. 796, 798 (D. C. Del., 1961).

We submit that defendants wholly failed to meet their burden.

b. *Convenience of Witnesses.*

Under this heading the District Judge bottomed the transfer order on the ground that a number of listed witnesses reside in the Boston area. However, nowhere does either the District Judge or any defendant point to any substantial inconvenience to these witnesses by the requirement of trial in Philadelphia.

Defendant Eastern Air Lines, Inc., in its affidavit which incorporated the affidavits of General Motors and Lockheed Aircraft Corporation, listed the names of forty-one witnesses, not including the crew and survivors, who are Massachusetts residents. Defendants did not list seven additional witnesses who are listed by the Civil Aeronautics Board as residents from states other than Massachusetts.

But even if these witnesses were not amenable to process for trial in Pennsylvania, analysis with respect to materiality, control and preservation of their testimony shows that it will *not* be lost by refusal to transfer.

Of the 41 witnesses listed by defendant, 16 are employed by the Federal Aviation Administration or the public airlines. Certainly the defendants can control the attendance of their own personnel and there is nothing to indicate that any is unwilling or unable to testify in Pennsylvania. In any event, depositions of the tower personnel or of any other witness may be taken either for discovery or for use at trial, or for both purposes.

Of the remaining 25 witnesses, 6 are children under the age of twelve whose testimony cannot be regarded either as vital or persuasive. The remaining 19 witnesses gave statements and testified at the Civil Aeronautics Board hearing as to the manner of the falling of the aircraft. We doubt that defendants need 19 witnesses to testify that the airplane crashed and how it crashed. Here

again, there is nothing whatever to preclude the taking of their depositions for use at trial.

The key witnesses to this accident are the persons who compose the ten survivors of the crash. Of these, three are from Pennsylvania, two from Georgia, two from Massachusetts, one from South Carolina, and three are in the Armed Services. It is these witnesses whose testimony is most needed at the time of trial, and seven out of ten are not residents of Massachusetts. As stated in *Ultra Sucro Company v. Illinois Water Treatment Company*, 146 F. Supp. 393, 398 (S. D. N. Y., 1956):

> "the judge must endeavor to determine who the key witnesses are rather than merely count up the possible witnesses for each side."

Moreover, any disproportion in numbers of witnesses required by defendant is more than offset by reason of the airline defendant's ability to bring its witnesses on its own planes or those of other carriers, a problem far more easily solved by defendants than by plaintiffs.

The Government adopts (p. 5 in No. 851) the District Judge's holding which brushes aside plaintiffs' genuine burden if forced to produce damage testimony in Boston, by making the sanguine observation that once liability has been determined, few, if any, cases such as these go to trial on damages (p. 8a in No. 851).

This gives scant comfort to the plaintiffs: (1) there is absolutely nothing to indicate that under Massachusetts law liability and damages *can* be severed; the two are inextricably intertwined, i.e., the amount of the damages depends on the degree of culpability; (2) there is no assurance that the Massachusetts court would sever the issues, even if it could do so; (3) it is error to suggest that plaintiffs will not need compensatory damage testimony in Boston unless and until they have overcome the Massachusetts punitive limit. Transfer, if upheld, would include the actions against the United States of America under the

Federal Tort Claims Act; in those actions the Massachusetts penal limit is inapplicable. Thus, even if the penal limit were applied in the corporate suits, plaintiffs would nevertheless be required to prove compensatory damages in Boston rather than in Philadelphia. It flies in the face of all reason and common sense to suggest that this is not harshly burdensome on the plaintiffs to a far greater degree than it could ever inconvenience the defendants; (4) it will be necessary in any event for defendants to produce witnesses in Philadelphia without reference to the transfer of the instant actions; this is so because of the pendency of two suits (arising out of this same crash) against defendant Eastern Air Lines, Inc., in the state courts of Pennsylvania sitting in Philadelphia (*Shakton v. Eastern Air Lines, Inc.*, Court of Common Pleas No. 4, September Term, 1961, No. 237, and Court of Common Pleas No. 6, September Term, 1961, No. 238). Thus, transfer of the instant cases to Boston does not and cannot avoid one or more separate trials in Philadelphia.

c. The Interest of Justice.

The defendant in No. 851 (at p. 5), adequately enumerates the grounds under this heading upon which the District Judge considered transfer to be required. We submit that none of these factors justify transfer, let alone "require" it.

(1) *Transfer From a More Congested Docket and Consolidation With Other Pending Cases.*

If transfer from a more to a less congested docket could fairly be said *ipso facto* to further the interest of justice, the point would merit little discussion. Concededly consolidation with other similar cases pending elsewhere must at first blush appear most attractive to a congested court. But surely the interest of justice is not determined by any array of statistics, either as to the number of cases pending elsewhere or the degree of congestion which obtains, for in that event, transfer would automatically be

made either to the least congested court or to that court having the greatest number of cases arising from the same accident. Such a standard by which to determine where the interest of justice lies is nowhere supported; it is particularly unsupportable here.

We submit that § 1404(a) was never intended as a vehicle to be used by a District Court for the purpose of relieving itself of portions of its own trial list. A transfer on such considerations would be tantamount to a bargain of convenience at the expense of plaintiffs who have done no more than institute suit in their domiciliary forum. [*Bush v. United Air Lines, Inc.*, 148 F. Supp. 104, 105 (S. D. N. Y., 1956); *Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co.*, 88 F. Supp. 863, 866 (S. D. N. Y., 1949)]. Moreover, transfer for such purpose may well create more rather than fewer problems and thus frustrate rather than further the aims of justice. [See *United Air Lines, Inc. v. United States*, 192 F. Supp. 796, 800 (D. C. Del., 1961)]. At least one Court of Appeals has held in a group of airline cases arising from one crash, that the same jury which determines liability must also fix damages [*United Air Lines, Inc. v. Wiener*, 286 F. 2d 302 (9 Cir., 1961)]. Thus, either all cases must be tried before a single jury on both liability and damages, or each must be treated separately.

There is absolutely nothing in the record in the cases at bar to show what benefit, if any, the proposed transfer would accomplish by way of consolidation with other such cases now pending in the Boston Federal Court. Counsels' correspondence on this point with the Clerk of that court showed that these same defendants there made no motions for consolidation, nor have any special procedures been established for trial (App. D, *infra*, pp. 9b-11b).[5] It would thus appear that nothing is to be gained administratively by transfer, which at best would yield "... only insignificant and uncertain benefits ..." *United Air Lines, Inc. v. United States*, 192 F. Supp. at p. 801.

5. Counsel for plaintiffs was informed by the deputy clerk by telephone on March 21, 1963, that this situation has not changed.

(2) *Desirability of Serving All Defendants.*

Further support for transfer is sought in the expression of defendants' "wish" (District Court Opinion, App. in No. 738, p. 2a, in No. 851, at p. 13a) to join as a third-party defendant the Massachusetts Port Authority, suable only in Massachusetts. Without reference to the question whether this vague assertion furnishes a real rather than an illusory reason, we submit that there is absolutely nothing in this record to show that the defendants are in any way unable to maintain their own separate and direct actions against that Authority if they claim it to be responsible, and that without any transfer whatsoever. This was exactly the procedure followed in *United Air Lines v. United States*, reported both in 192 F. Supp. 795 (D. C. Del., 1959) and 192 F. Supp. 796 (D. C. Del., 1961).

(3) *Handling Litigation at Its Origin in a Forum at Home with State Law.*

A further factor claimed by the defendants and adopted by the District Judge as favoring transfer (Opinion, App. in No. 738 at p. 12a, in No. 851 at p. 14a) is the handling of litigation "at its origin" and "in a forum that is at home with state law". We submit that this point is unsubstantial and without merit as a reason for transfer.

Without reference to the fact that the courts of one district must be presumed to be as well qualified to handle litigation as those in another, the District Court in Philadelphia is constantly called upon to determine and apply the laws of other states. Indeed, it may even encounter difficulty in determining the law of the very state in which it sits. The defendants have pointed to no instances where the substantive law of negligence of Massachusetts differs in any particular from the substantive law of negligence of Pennsylvania.

We submit that this contention of the defendants simply unmasks the real purpose of the motions, which is to force

application of the Massachusetts penal restriction to these cases, camouflaged by an illusory appeal to the factors of convenience and justice contemplated by § 1404(a).

The serious inconvenience and genuine hardship to the plaintiffs which would flow from transfer of these cases, together with the emasculation of their damage claims, indicate overwhelmingly that those factors far exceed any genuine inconvenience to defendants by retention of the actions in the domiciliary forum of choice. It is these additional factors which establish that the order of the District Court constituted a clear abuse of discretion. It is these additional reasons which further establish that the Court of Appeals' decision is correct and should not be reviewed.

III. The Opinion of the Court of Appeals Is Consistent with All Other Federal Decisions.

The opinion of the Court of Appeals is in harmony with the only other reported federal case in which transfer of a death action was opposed on the ground that the transferee district was not a district in which the plaintiff had capacity to sue. In *Felchlin v. American Smelting and Refining Company*, 136 F. Supp. 577, suit was filed in a federal court in California by executors who were qualified in California. The defendant moved under § 1404(a) to transfer the case to the Western District of Texas. The Court refused transfer on the ground that the proposed transferee district was not a district in which the action "might have been brought" because the plaintiffs had no capacity to sue in Texas. The *Felchlin* case was examined by the Court of Appeals in the instant cases in the following language (App. in No. 738, p. 27a; App. in No. 851, p. 32a):

> "Respondent and intervenors seek to distinguish Felchlin from the case at bar on the grounds that a suit by a foreign personal representative in Texas is a nullity, whereas in Massachusetts lack of capacity is a mere defense to the action and can be waived. How-

ever, we deem this distinction insubstantial, for whether lack of capacity precludes a prospective plaintiff from filing suit in the first instance, or subjects him to a dismissal at the instance of the defendant, the result is the same. In either case he does not have an unqualified right to sue."

The defendants allege (pp. 12, 15-16 of petition in No. 738; pp. 10-11 of petition in No. 851) that the decision of the Court of Appeals conflicts in principle with this Court's opinion in *Hoffman v. Blaski*, 363 U. S. 335, 344, wherein it is said that it would be grossly discriminatory to permit the defendants to transfer a case to a district to which the plaintiffs could not transfer it without the consent and waiver of the defendants (which is also the situation in the instant case). Defendants complain that plaintiffs may have an unfair choice of forum because they may seek qualification only in the particular state in which they wish to litigate. But that is *not* this case. Here the plaintiffs could and did obtain original appointment as fiduciaries *only* in Pennsylvania, the domicile of each of these decedents, and it is in the domiciliary forum that their actions pend.

Defendants' reasoning is otherwise fallacious. The plaintiff in every case is given a choice of suing the defendant in any district in which the defendant is a resident. In many state courts, including those of Pennsylvania, a defendant may be sued in any county in which he can be served, and there is no provision for transfer. There is nothing unjustly discriminatory, or even unsual, about this.

Moreover, the defendants erroneously assume that the plaintiffs could qualify as personal representatives in Massachusetts merely by applying for ancillary letters there. Such is not the case. The appointment of an ancillary or a special administrator is in the *discretion* of the Massachusetts Probate Court: Mass. General Laws (Ter. Ed.), c. 215, § 3, as amended, 7 Ann. Laws of Mass. 157; Mass. Gen-

eral Laws (Ter. Ed.), c. 193, § 10, as amended, 6 Ann. Laws of Mass. 399 (see App. in No. 738, p. 25a; App. in No. 851, pp. 29a-30a).

The defendants allege (pp. 12-16 of petition in No. 738; pp. 7-11 of petition in No. 851) that the decision of the Court of Appeals conflicts in principle with this Court's opinion in *Continental Grain Company v. The FBL-585*, 364 U. S. 19 (1960). Such allegation is in error.

The *Continental Grain Company* case is completely dissimilar and simply holds that the unique admiralty *in rem* fiction is not relevant to a motion to transfer under § 1404(a). This Court there noted that the *in rem* fiction has for its purpose the allowance of actions against ships "where a person owning the ship could not be reached" (364 U. S. at page 23). It is merely "an alternative way of bringing the owner into court" (364 U. S. at page 26).

The Court of Appeals correctly and succinctly disposed of this argument of the defendants as follows (App. in No. 738, p. 27a; App. in No. 851, p. 32a):

> "The transfer sanctioned in Continental Grain Co. v. Barge FBL-585, 364 U. S. 19, 80 S. Ct. 1470, 4 L. Ed. 2d 1540 (1960), is no help to respondent and intervenors, for that decision is premised on a fiction peculiar to the admiralty law."

It is noteworthy that *Hoffman v. Blaski* (which the Court of Appeals follows), and *Continental Grain Company v. The FBL-585* were argued before this Court on the same day (April 20, 1960), and that the opinions in the two cases were handed down only two weeks apart. It is inconceivable that the principles of law expounded in these two cases could be in conflict.

Goldlawr, Inc. v. Heiman, 369 U. S. 463 (1962), an antitrust case cited by the corporate defendants (page 13 of petition in No. 738) as being in conflict with the opinion of the Court of Appeals, is not in point. It merely held that lack of personal jurisdiction over two corporate de-

fendants by the transferor court did not preclude it from transferring the case pursuant to 28 U. S. C. A. § 1406(a) [a section not even involved in the cases at bar].

In summary, *Felchlin v. American Smelting and Refining Company*, 136 F. Supp. 577, the only other reported decision dealing with the issue involved in the instant case in the more than 14 years in which § 1404(a) has been in effect, is in complete accord therewith. Both that opinion and the instant opinion are in full harmony with *Hoffman v. Blaski*, which holds that a district court has no power to transfer an action under § 1404(a) to any district in which plaintiff did not have an *unqualified* right to bring and maintain the action "independently of the wishes of defendant".

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

ELWOOD S. LEVY,
DAVID F. BINDER,
Counsel for Respondents (in No. 13,994).

March 27, 1963.

APPENDIX A.

	Civil Action Nos.
Roberta Barrack, Administratrix of the Estate of Jack M. Barrack, Deceased	29,274
Lorraine Browndorf, Administratrix of the Estate of Irving Browndorf, Deceased	29,099
Henry C. Gransden, Administrator of the Estate of Henry V. Gransden, Deceased	28,763
J. Michael King and Berks County Trust Company, Executors u/w of Henry P. King, Deceased	29,615
Barbara B. Meltzer, Administratrix of the Estate of Allan J. Meltzer, Deceased	28,762
Ida G. Schwartz, Executrix u/w of Meyer A. Schwartz, Deceased	29,160
Elizabeth B. Schwartz, Executrix u/w of Theodore William Schwartz, Deceased	29,159
Ruth Staller, Administratrix of the Estate of Phillip Staller, Deceased	30,266
Joyce J. Wright, Administratrix of the Estate of John Allen Wright, Deceased	30,200

v.

EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORP. AND GENERAL MOTORS CORPORATION.

	Civil Action Nos.
Roberta Barrack, Administratrix of the Estate of Jack M. Barrack, Deceased	29,275
Lorraine Browndorf, Administratrix of the Estate of Irving Browndorf, Deceased	29,100
Henry C. Gransden, Administrator of the Estate of Henry V. Gransden, Deceased	28,764
J. Michael King and Berks County Trust Company, Executors u/w of Henry P. King, Deceased	29,616
Barbara B. Meltzer, Administratrix of the Estate of Allan J. Meltzer, Deceased	28,788
Ida G. Schwartz, Executrix u/w of Meyer A. Schwartz, Deceased	29,162
Elizabeth B. Schwartz, Executrix u/w of Theodore William Schwartz, Deceased	29,161
Ruth Staller, Administratrix of the Estate of Phillip Staller, Deceased	30,263
Joyce J. Wright, Administratrix of the Estate of John Allen Wright, Deceased	30,230

v.

THE UNITED STATES OF AMERICA

v.

EASTERN AIR LINES, INC.,
Third Party Defendant.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,994.

BARRACK, ET AL.,

Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13,997.

POPKIN, ET AL.,

Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.,

No. 14,003.

RAPP, ADMINISTRATOR, ET AL.,

Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.,

Appendix B

No. 14,011.

BIERNBAUM, ET. AL., EXECUTORS, ETC.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL,

No. 14,033.

LAISTER, EXECUTRIX, ETC., ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.,

Present: STALEY and FORMAN, *Circuit Judges*, and LANE, *District Judge*.

It is ORDERED that the last paragraph on page 7 and concluding on page 8 of the opinion of this Court filed November 19, 1962, which reads:

"What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13997 conceded that transfer of the Abate cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Subsequently, counsel informed this court by letter that the Reitz case (Civil Action No. 30303) and the Braff case (Civil Action No. 30304) must even-

tually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. Thus, with respect to these three suits, the district court's order of transfer was proper and will not be set aside."

be and it hereby is amended to read as follows:

What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the Abate cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Thus, with respect to these suits the district court's order of transfer was proper and will not be set aside. Subsequently counsel informed this court by letter that the Reitz case (Civil Action No. 30303) and the Braff case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. With respect to these suits, therefore, we do not pass upon the question whether the district court's order of transfer was proper since it is not contested here.

By THE COURT:

STALEY,
Circuit Judge.

Dated: February 21, 1963

APPENDIX C.

Excerpts From District Court Transcript.

(6) The Court: And, also, I suggest to you in presenting your argument, remember that the Supreme Court and the Appellate Courts have said what justice means in Section 1404(a), and a trial judge is here to carry out the directions of the Appellate Court, not to use his emotional feelings as to what justice may mean in that section. It has been given a definition, and it seems to me that those considerations that have been stated are the considerations which the Court is expected to follow, in the absence of some legislative history or other information showing other considerations.

Similarly, I know of no reason why a court is not expected to recognize that experienced counsel, such as (7) are involved in this case, when they file a suit and they know 1404(a) is in the law, and then to come in here and say, "Oh, isn't it awful," somebody wants to transfer the case. They could have gone into the State Court. There are plenty of other forums that could have been chosen; but when you choose a Federal forum, you accept the law as it is at that time, and 1404(a) was in the Federal law when this case was started, when all these cases were started. And, of course, if the other side sits back and does not make a motion and allows you to go to a lot of expense that is one thing. If there are cases which say that the extent of discovery has been such that the defendant should be estopped, that would be a perfectly proper argument, as I see it, under the cases.

* * *

(10) Mr. Levy: The other observation I would like to make, if the Court please, is that in connection with Your Honor's comments as to 1404(a), I must confess a very uncomfortable feeling of pre-judgment. I hope, of course, that the

feeling is completely misplaced. It may be, and certainly is the law (11) that anyone who institutes suit in the Federal Courts institutes it subject to the laws applicable to the Federal Courts, but it does not follow from the fact that such suit was instituted in the Federal Court that because a motion is made it means "transfer".

The Court: Of course, it does not, but there are a lot of arguments. I am commenting on the briefs. You have got a limited time to argue. I am trying to help you, Mr. Levy. And there are large portions of these briefs which deal with the fact of how terrible it is to even consider the fact of transfer because the plaintiffs' attorneys have done so much work.

Now, I say that the plaintiffs' attorneys in doing work did it having in mind all the federal statutes and federal rules. Now, you can proceed to argue it, but I am just suggesting to you that in using your thirty minutes, each of you, that you have that point in mind, because I think it has been overlooked in many of the briefs.

* * *

Mr. Kreindler: Your Honor, may I ask a question which troubles me a bit and might save some time? The Court indicated that 1404(a) contains its own definition of justice. Now, as I understand 1404(a) it contains three standards, convenience of parties, convenience of witnesses and interest of justice. Is the Court suggesting that interest of justice adds nothing to the other two?

The Court: Oh, no, no.

Mr. Kreindler: I just wanted to——

The Court: No. I just meant that the phrase "interest of justice" as used there had been commented on and defined by the Appellate Courts.

Mr. Kreindler: I see.

The Court: And it was not just a question of a trial judge applying what he thought "justice" meant.

Mr. Kreindler: I misunderstood what Your Honor had said, and I thought you had said that the definition was (13) built into the section itself.

The Court: Oh, no. In so far as I know, there is no definition in the section.

Mr. Kreindler: All right. Thank you.

The Court: But the Appellate Courts have said "these are the considerations——"

Mr. Kreindler: I understand.

The Court: "—which you take into account in determining what the interests of justice are as that phrase is used in that section."

APPENDIX D.

LETTER OF DECEMBER 28, 1961

December 28, 1961

John A. Canavan, Clerk
United States District Court
Federal Building
Boston, Massachusetts

Dear Mr. Canvan:

With reference to the crash of the Eastern Air Lines Electra plane at Logan Airport, Boston, on October 4, 1960, we are advised that approximately seventy-eight law suits arising from this accident are presently pending in the United States District Court for the District of Massachusetts.

Approximately fifty-seven cases arising out of the same accident are also pending in the United States District Court for the Eastern District of Pennsylvania (Philadelphia). In some of these this firm is counsel for the plaintiffs.

Motions to transfer to the Federal Court in Boston are presently pending in the Philadelphia Federal Court. As a matter of interest with respect to the handling of multiple claims arising from a single catastrophe, I would appreciate being advised whether to your knowledge any special procedures have been established in your court with respect to the processing or trial of the cases now pending there. Has any indication been given as to whether each of the cases will be tried separately before separate juries or if there will be consolidation, to what extent? It would also be informative to know whether any motions for consolidation have been filed and if so, whether they have been granted or denied.

I would appreciate any information you could furnish along these lines.

Very truly yours,

ELWOOD S. LEVY

ESL:elp

LETTER OF JANUARY 9, 1962

UNITED STATES DISTRICT COURT
District of Massachusetts
Office of the Clerk
1525 Federal Building
Boston 9

John A. Canavan, Clerk

January 9, 1962

Re: Crash October 4 1960 of Eastern Air Lines Electra plane

Dear Mr. Levy:

This will acknowledge receipt of your letter dated December 28, 1961 upon the subject matter above.

Answering your several questions, please be advised that no special procedures have been established in this District with respect to processing or trial of cases now pending here, nor has any indication been given as to whether the cases will be tried separately or if they will be consolidated for trial. To date, no motion for such consolidation has been filed.

Very truly yours,

JOHN A. CANAVAN
John A. Canavan, Clerk, FRF

Elwood S. Levy, Esquire
Messrs. Richter, Levy, Lord, Toll & Cavanaugh
121 South Broad Street, Philadelphia 7, Pa.

LETTER OF JANUARY 11, 1962

January 11, 1962

Hon. Francis L. Van Dusen
2110 United States Court House
Ninth and Chestnut Streets
Philadelphia 7, Pennsylvania

Re: Eastern Air Lines Electra crash—Boston, October 4, 1960

Dear Judge Van Dusen:

During the preparation of my supplemental brief forwarded on behalf of Barrack et al. December 29 last, it occurred to me that it might be of interest to your Honor to know whether the Massachusetts Federal Court had put into effect any specialized procedures for the processing or expediting of the fifty-seven cases there pending and involving the same crash giving rise to the matters now pending before your Honor. Accordingly, I wrote to the Clerk of the Federal Court at Boston but did not receive a reply until today. I enclose herewith a copy of my letter of December 28 to the Clerk and a copy of his reply dated January 9, 1962.

I think it noteworthy that to date none of the defendants there, which group most certainly includes some or all of the identical defendants here, has filed any motion for consolidation of trials. It would therefore appear that apart from a shorter median interval from the time of suit to the time of trial (which would not be advantageous to plaintiffs) there is nothing to be gained administratively by the transfer of these matters to Boston.

Very truly yours,

ELWOOD S. LEVY

ESL:ch
Enclosures
cc. J. Grant McGabe, III, Esquire
Sidney L. Wickenhaver, Esquire
Owen B. Rhoads, Esquire
Robert E. Jones, Esquire
Max L. Kane, Esquire